No. 86-327

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

MULLINS COAL COMPANY, INCORPORATED OF VIRGINIA, OLD REPUBLIC INSURANCE COMPANY AND JEWELL RIDGE COAL CORPORATION,
Petitioners,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, GLENN CORNETT, LUKE R. RAY, GERALD R. STAPLETON AND WESTMORELAND COAL COMPANY,
Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

BRIEF FOR THE RESPONDENT GERALD R. STAPLETON

S. STROTHER SMITH, III
Counsel of Record
P.O. Box 1204
Abingdon, Virginia 24210
(703) 628-8441
Counsel for Respondent,
GERALD R. STAPLETON

PRESS OF BAM PRINTING, HYATTSVILLE, MD 20781 (301) 864-6862

QUESTION PRESENTED

Should the Employer or Director be allowed an unlimited search for negative re-readings of x-ray reports, thus giving them the "preponderance of the evidence" when the x-ray was initially read by a certified "B" reader (final reader)?

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I.

STATEMENT OF THE CASE

A claim for benefits was filed by Gerald R. Stapleton, July 31, 1975, under Part C of The Coal Mine Health & Safety Act of 1969 as amended, hereinafter called the "Act".

After proper preliminary proceeding, a hearing before an Administrative Law Judge was held on November 6, 1980. A Decision and Order denying benefits was entered on April 14, 1981.

Notice of Appeal of the Administrative Law Judge's Order was mailed by Mr. Stapleton on May 8, 1981. An appeal to Benefits Review Board was timely filed by Mr. Stapleton's counsel.

A Decision and Order was entered by the Benefits Review Board affirming the Administrative Law Judge's denial of benefits.

Mr. Stapleton duly filed his Notice of Appeal from the United States Department of Labor, Benefits Review Board, to the United States Court of Appeals for the Fourth Circuit.

The Fourth Circuit Court of Appeals rendered an opinion on February 26, 1986, and denied a rehearing. From this decision, Mr. Stapleton has filed a motion to proceed *in forma pauperis*.

II.

SUMMARY OF THE ARGUMENT

The unlimited search for Doctors who will give "negative" opinions so as to obtain for the Employer and the Director a presumed "preponderance of the (THE NUMBER) of reports" thereby presumably giving them

the "preponderance of the evidence" which, in the first place is not true even in regular civil cases, and in the second place goes strictly contrary to the intent of Congress in passing the legislation should be stopped.

III.

ARGUMENT

1. The Court Of Appeals, In Upholding The Decisions Denying Benefits Under The Coal Mine Health And Safety Act Of 1969, Utterly Failed To Properly Apply The Law To The Facts In The Instant Case.

A. *The decisions below were clearly erroneous when Mr. Stapleton had worked in the coal mines, underground, for more than fifteen years so that the "Interim Presumption" arising under* 20 CFR Section 727.203(a) *statutorily applied to the claimant's case.*

20 CFR (Code of Federal Regulations) Section 727.203(a)(1) states:

Section 727.203 INTERIM PRESUMPTION

> *(a) Establishing interim presumption.* A miner who engaged in coal mine employment for at least 10 years *will be presumed to be totally disabled due to pneumoconiosis*, or to have been totally disabled due to pneumoconiosis at the time of death, . . . if one of the following medical requirements is met:
>
> (1) A chest roentgenogram (x-ray), biopsy or autopsy establishes the existence of pneumoconiosis (see Section 410.428 of this title):
>
> (2) Ventilatory studies [PFS] establish the presence of a chronic respiratory or pulmonary disease (which meets the requirements for duration in Section 410.412(a)(2) of this title) as demonstrated by values which are equal to or less than the values specified in the following table:

	= or < FEF1	MVV
67" or less	2.3	92
68"	2.4	96
69"	2.4	96
70"	2.5	100
71"	2.6	104
72"	2.6	104
73" or more	2.7	108

Emphasis ours.

1. *A positive x-ray finding of CWP by a "B" reader is conclusive of the existence of pneumoconiosis in the claimant.*

Mr. Stapleton had clear evidence of pneumoconiosis by the report of clearly read x-rays taken of his chest as read and reported by Dr. Navani—a "B" reader (as established by NIOSH). That report showed Mr. Stapleton as suffering from CWP 1/0 t and 1/0 q.

In that regard, the ALJ said he would not credit Dr. Navani's report because Dr. Byer's report said that the x-rays that he took showed 0/1 p CWP—A call in which the Employer's doctor, Dr. Byers, was in essence saying that he did not think that there was CWP, *that there might possibly be CWP.*

The ALJ also referred to Dr. Franke's more recent x-ray rereading of Dr. Byers' x-ray in which Dr. Franke stated that it was his opinion that the x-ray was clear of all abnormalities.

In doing this, the ALJ held:

> Under subsection (b)(4), the employer will prevail if the employee does not have pneumoconiosis . . . Only Dr. Navani's Nov. 30, 1976 x-ray was positive for pneumoconiosis. I must weigh the more recent x-ray

> of Dr. John Byers . . . in which he found that there was essentially no evidence of pneumoconiosis . . .

The issue of whether the ALJ may ignore one positive x-ray reading by a so-called "B" reader in favor of one or more negative (or essentially negative) readings and using that as a basis for finding that the "Interim Presumption" is not applicable in favor of the Claimant in Black Lung cases has long ago been decided. *A positive finding by a "B" reader is conclusive of the existence of pneumoconiosis in the claimant. Whitman* v. *Califano*, 617 F.2d 1055 (4th Cir. 1980).

The reasoning behind this rule was probably best stated by Judge James C. Turk, Chief Judge of the United States District Court for the Western District of Virginia in an admittedly "Part B" black lung case, but one which interpreted the corresponding provisions under that part to Section 727.203(a)(1) under "Part C" of the act under which the instant case arises. *Stewart* v. *Matthews*, 412 F.Supp. 235 (W.D.Va. 1975).

In *Stewart (ibid)*, as in the case at bar, Dr. Navani, a "B" reader had made an earlier positive finding of 1/0 p CWP on reading one of the claimant's x-rays. Later readings, as in the case at bar, by other so-called "B" readers, held the claimant's x-rays did not show pneumoconiosis and the ALJ gave the credence to the later reports and refused to give Stewart the benefit of the presumption. There the Court held:

> *The Court has determined that the crux of the controversy in this case concerns the significance to be attached to the roentgrenographic (x-ray) readings and re-readings developed during the course of the administrative adjudication. Plaintiff contends that the x-ray evidence is sufficient to entitle him to the "Interim Presumption" of total disability due to*

> *pneumoconiosis. . . . The Secretary determined that the preponderance of the evidence weighs against such a finding.*

The earliest x-ray evidence to be considered consists of a report by Dr. William C. Barr dated Oct. 27, 1970. In that report, Dr. Barr noted absolutely no evidence of pneumoconiosis. . . . *Dr. Dodrill noted a complete absense of pneumoconiosis.*

* * * *

. . . Dr. Shiv Navani noted pneumoconiosis category 1/0 p.

. . . [T]he Law Judge then requested Dr. Bristol to re-read the film. . . .

* * * *

Dr. Bristol noted no evidence of pneumoconiosis. . . .

* * * *

In an opinion eventually adopted as the final decision by the Secretary, the Administrative Law Judge produced an opinion denying Mr. Stewart's entitlement to benefits.

* * * *

> *The Court takes judicial notice of the fact that . . . Dr. Navani was classified as a "B" reader. Thus under the regulatory provision [of 42 CFR Section 37.52, which provides that interpretations of "B" readers will be considered final, and further that an original reading by a "B" reader will preclude any reason for additional readings], Dr. Navani's initial reading should have been considered FINAL. . . . Certainly, if the Law Judge continues to seek re-readings ad infinitum, he will eventually come upon a conservative reader who will find the films to be negative. . . . Indeed the repeated re-reading of films is exactly the form of administrative "one-*

> *upmanship" discouraged by Congress as it enacted the '72 amendments to the . . . Act.* (See Rep. No. 92-743, 92nd Cong. 2d Session, (1972).] [Emphasis supplied]

This same result and holding was set forth in an even more similar case by this Honorable Court in the 1980 decision of *Whitman* v. *Califano*, 617 F.2d 1055 (4th Cir. 1980), and would be the controlling case law herein.

Thus, since a positive finding by a "B" reader is conclusive of the existence of pneumoconiosis in the claimant, and since the claimant herein clearly had such a positive finding, *it would have been error for the ALJ and the BRB to have failed to give the Appellant, Mr. Stapleton, the benefit of the "Interim Presumption" under the provisions of 20 CFR Section 727.203(a)(1).*

2. *Mr. Stapleton should have been given the benefit of the "Interim Presumption" under Section 727.203(a)(2).*

Mr. Stapleton should have been given the benefit of the "Interim Presumption" under Section 727.203(a)(2), *supra*, because, despite the multitudinous efforts of Westmoreland's doctor (Dr. Byers) to down play and discredit his own pulmonary function studies (which should never have been taken, considering Mr. Stapleton's recognized heart condition), *the PFS taken by Westmoreland's own doctor and introduced by Westmoreland, clearly show by an valid statistical method that Mr. Stapleton had pulmonary function studies which, if valid to be considered at all* (and the Appellant-Employer inferred that they should be accepted when that party introduced this evidence), *had to qualify Mr. Stapleton for the "Interim Presumption" under the provisions of Section 727.203(a)(2).*

In this regard, Mr. Stapleton, the Claimant in the case at bar, is 74.5" tall and weighs 155 pounds. Therefore,

under the "Interim Presumption" as set forth in Section 727.203(a)(2) *supra, he would qualify for the "Interim Presumption" if his FEV1 is equal to or less than 2.7 and his MVV is less than 108.*

Mr. Stapleton's medical records show by the employers' doctor, Dr. Byers, shows an *average FEV1* for all eight tests *of 2.23* and *an average MVV* for all eight tests *of 102.14*!

If, instead of using the statistical *average* as a method of trying to come to some comprehensible result from the Employer's doctor's improper testing of Mr. Stapleton, we use the statistical *means* as a method of trying to come to a comprehensible result from the Employer's doctor's improper testing of Mr. Stapleton, we find that the *mean FEV1 (i.e.*, the FEV1 for test #4 and test #5) *is 1.11 to 1.02*, and the *mean MVV is 70 to 87.*

Thus, under the Employer's own doctor's examination (if it is to be given any validity at all), and in spite of everything that that doctor could do to discredit his own test results, it is clear that Mr. Stapleton qualifies for the "Interim Presumption" if he but worked in the mines for a mere 10 years. He actually worked at least 15 years.

B. *The decisions below were clearly erroneous when there was no legally viable evidence to rebut the presumption.*

Once it is clear that Mr. Stapleton should have been given the benefits of the "Interim Presumption" which are specifically called for in the Act of Congress which required the payment of benefits for retired coal miners who are disabled to work in their last coal mine employment (or similar employment) and which are allowed specifically under 20 CFR Section 727.203(a)(1) & (2), then the only question remaining to determine whether the

decisions of the ALJ and the BRB (backing up that ALJ decision) were proper is to determine whether they properly found that the "Interim Presumption" had been rebutted.

20 CFR Section 727.203(b) sets forth the standards whereby the "Interim Presumption", once established may be rebutted. That section says:

> *(b) Rebuttal of Interim Presumption. In adjudicating a claim under this subpart, all relevant medical evidence shall be considered. The presumption in paragraph (a) of this section shall be rebutted if:*
>
> *(1) The evidence establishes that the individual is, in fact, doing his usual coal mine work or comparable and gainful work . . .; or*
>
> *(2) In light of all relevant evidence it is established that the individual is able to do his usual coal mine work or comparable and gainful work . . .; or*
>
> *(3) The evidence establishes that the total disability of the miner did not arise in whole* or in part *out of coal mine employment, or*
>
> *(4) The evidence establishes that the miner does not have pneumoconiosis . . .*

To be read *in pari materia* with Section 727.203, is 20 CFR 410.422. That sections states in part:

Section 410.422 Determining total disability: General Criteria.

* * * *

(c) Whether or not the pneumoconiosis in a particular case renders . . . a miner totally disabled . . . is determined from *all the facts of the case . . .*

It is also to be read *in pari materia* with Section 410.426. That section states in part:

> *(a) Pneumoconiosis which constitutes neither an impairment listed . . . nor the medical equivalent thereof, shall nevertheless be found totally disabling if because of the severity of such impairment, the miner is . . . not only unable to do his previous coal mine work, but also cannot, considering his age, education and work experience, engage in any other kind of comparable and gainful work available to him in the immediate area of his residence . . . Medical impairments other than pneumoconiosis may not be considered.*

4. An x-ray read by Dr. Shiv Navani, *a certified "B" reader,* on November 30, 1976, indicated an increase in small nodular and linear densities throughout the lungs consistent with changes of CWP type t 1/0 and q 1/0 with combined profusion of 1/0. Note is also made of presence of peribronchial thickening in large bronchi and in hilar regions. (see App. p.3, 159).

5. Dr. S. K. Paranthaman, Director, Respiratory Disease Clinic, Lonesome Pine Hospital, Big Stone Gap, Virginia, stated that:

> *Lung markings are slightly accentuated and are suggestive of coal worker's pneumoconiosis, type t 1/0 and q 1/0 with combined profusion of 1/0 . . . PFT shows mild to moderate obstructive ventilatory abnormality and possible restrictive lung disease; . . . In summary, this patient has evidence of coal worker's pneumoconiosis and possible chronic bronchitis. supra* p.9.

6. The Employer's own doctor stated:

> *. . . there are increased bronchovascular markings at both bases that are somewhat irregular in nature and which have apparently been read as "p" sized irregular interstitial densities on previous readings for CWP. ibid.*

7. Even more important he said:

> *This patient does appear to suffer from a mild to moderate respiratory impairment manifest as a decrease in arterial oxygenation.*
>
> * * * *
>
> *There is an abnormality of arterial blood gases which is not fully explained and which might be associated with dyspnea on moderate exertion.* [emphasis supplied] *ibid.*

8. This same employer's doctor recognized that Mr. Stapleton had *no evidence of:*

> *. . . contact with tuberculosis, birds, or bird feces, asbestos filters, or other pulmonary pathogens.* [emphasis supplied.] *ibid.* (see App. p.179).

9. and he also recognized that:

> *He worked in the coal mines for 15 years from 1958-72 . . .* [AND] *. . . All of his work was underground* as a loader, cutter helper, shuttle car operator, and as general underground utility and on the beltlines. His last job was as a utility man and most particularly driving a shuttle car. [emphasis supplied] *ibid.*

There was really no evidence upon which a rebuttal could be based:

First, there was absolutely no evidence relative to the physical demands of Mr. Stapleton's last prior coal mine employment, and so there was *no evidence to show that the job did not in fact require the same "moderate exertion" that Westmoreland's own doctor had reported would be "associated with dyspnea." supra* p. 9. If his job required such exertion then clearly he could not physically carry out the requirements of that job. If it did not, then maybe he could, but the Employer, who certainly had it in their ability to produce such evidence failed to do

so, and certainly neither they nor the ALJ can say that the "Interim Presumption" was rebutted in this case.

Secondly, there was no evidence concerning the environmental condition under which Mr. Stapleton would have to work if he re-assumed his former job or one of a similar nature in the immediate area of his residence. Could he work under those conditions, considering his pulmonary respiratory condition? That question would have to be answered before anyone could reasonably say that the "Interim Presumption" had been rebutted. *We must remember that* "disability must be determined from all of the facts of the case . . .", and where the presumption is in favor of the Claimant, the ABILITY must also be determined from all of the facts.

It does not do in rebutting a presumption to say that he has other medical problems. 20 CFR Section 410.426(a) specifically states that "medical impairments, other than pneumoconiosis may not be considered." If this be true in establishing disability, it must also be true in rebutting disability. Furthermore, other regulations specifically say that negative x-rays and non-qualifying PFS tests and non-qualifying blood gas studies may not be used solely as the basis for denying benefits of rebutting the presumption.

CONCLUSION

For the reasons stated, it is respectfully submitted that in the case at bar, the ALJ and the BRB, in its upholding of the ALJ's decision denying benefits under the Coal Mine Health and Safety Act of 1969, utterly failed to properly apply the law to the facts in the instant case because:

A. *The decisions below were clearly erroneous when Mr. Stapleton had worked in the coal mines, under-*

ground, for more than fifteen years so that the "Interim Presumption" arising under 20 CFR Section 727.203(a) *statutorily applied to the Claimant's case since:*

1. A positive x-ray finding of CWP by a "B" reader is conclusive of the existence of pneumoconiosis in the claimant,

2. Mr. Stapleton should have been given the benefit of the "Interim Presumption" under Section 727.203(a)(2) *and because;*

B. *The decisions below were clearly erroneous when (under the recent decisions of this Honorable Court) there was no legally viable evidence to rebut the Interim Presumption.*

Respectfully submitted,

S. STROTHER SMITH, III
Counsel of Record
P.O. Box 1204
Abingdon, Virginia 24210
(703) 628-8441
Counsel for Respondent,
GERALD R. STAPLETON